UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
ROBERT C. LEITER,	)	CASE NO. 03-34726 HCD
	)	CHAPTER 7
DEBTOR.	)	
	)	
ROBERT C. LEITER,	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 06-3037
	)	
INDIANA DEPARTMENT OF	)	
ENVIRONMENTAL MANAGEMENT,	)	
DEFENDANT.	)	

Appearances:

Mark E. Shere, Esq., attorney for plaintiff, 6831 Mohawk Lane, Indianapolis Indiana 46260; and

Julia A. Kent, Esq., Deputy Attorney General, attorney for defendant, Attorney General's Office, 302 West Washington Street, Indiana Government Center South, 5th Floor, Indianapolis, Indiana 46204

MEMORANDUM OF DECISION

At South Bend, Indiana, on June 26, 2006.

Before the court is the Motion to Dismiss for Lack of Jurisdiction filed on March 29, 2006, by the defendant Indiana Department of Environmental Management ("IDEM") against the plaintiff Robert C. Leiter ("Leiter," "plaintiff," or "debtor"). IDEM seeks dismissal of the plaintiff's Complaint for Violation of Bankruptcy Discharge, filed February 23, 2006. The plaintiff has timely objected to the motion with a Response to IDEM's Motion to Dismiss. The time period for further reply having passed, the court took the motion under advisement on May 24, 2006. For the reasons that follow, the court denies the Motion to Dismiss.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and

determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(J) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

The plaintiff bought a parcel of farmland near Warsaw, Indiana, in 1994. He built homes on the site, but avoided building on the half-acre area designated by an environmental consulting company as a wetlands. Instead, he planned to put in a pond to hold rainwater and snow. The consulting company advised him that the construction of a berm, with plantings, would create new wetlands on the property and would meet the environmental permit requirements. In December 1994, Leiter submitted an application to IDEM for a Water Quality Certification under the Clean Water Act. In the application, he identified the half-acre area of wetlands on the property and proposed a mitigation project to compensate for the proposed impacts to that area. On January 13, 1995, IDEM issued a Water Quality Certification for the proposed impacts to wetlands, contingent upon the implementation of the mitigation project. The Certification stated that Leiter must meet certain conditions in order to comply with Section 401 of the Clean Water Act.

It turned out that Leiter did not use the full half-acre wetlands area for the pond. He constructed a berm, as the consulting company had suggested, but the vegetation did not take hold initially. He sold the last parcel of the farm property in 1999.

On June 16, 1998, IDEM learned that Leiter had impacted the wetlands described in the Certification but had not implemented the mitigation project. On November 9, 2001, IDEM issued a Notice of Violation ("NOV") against Leiter, pursuant to Indiana Code § 13-30-3-3, citing various violations to the wetlands. IDEM

demanded that he create a new wetlands. Instead of resolving the NOV through an Agreed Order, Leiter filed bankruptcy. IDEM took no action during the pendency of the bankruptcy.

Leiter filed a voluntary chapter 7 petition on August 18, 2003. He listed IDEM on Schedule E as a creditor with a contingent, unliquidated, disputed administrative claim. IDEM did not file a proof of claim. Following the Trustee's report that there were no assets available for distribution to creditors, the debtor was discharged on December 1, 2003. The case was closed on January 19, 2004. More than a year later, on June 1, 2005, IDEM issued a "Notice and Order of the Commissioner of the Indiana Department of Environmental Management" ("IDEM Order") requiring Leiter to construct a new wetlands, as set forth in the January 13, 1995 Certification, and to monitor it over a period of years. On June 17, 2005, Leiter filed a petition for administrative review of the IDEM Order. Although he participated in the administrative process, he consistently maintained that the IDEM Order violated his bankruptcy discharge.

On March 13, 2006, the court granted the debtor's Motion to Reopen the case. Because the debtor believed that IDEM had violated the bankruptcy discharge, he filed a Complaint for Violation of Bankruptcy Discharge alleging that IDEM, a named creditor in his bankruptcy, now was pursuing its belated claim against him. In the Complaint he stated: "In good faith, Leiter believed at the time of the bankruptcy that he had done a good and reasonable job of responding to the wetland issues. He would have complied with any requirements from the bankruptcy court." R.1, ¶ 29. The Complaint's allegations include the following:

(A) that IDEM violated the bankruptcy discharge under § 524(a) and was in civil contempt;

(B) that IDEM's underlying prepetition certification demand was invalid and defective on its merits;

(C) that the statute of limitations on IDEM's demand had expired; and

(D) that no discernible environmental harm had occurred.

IDEM responded by filing a Motion to Dismiss, asserting that this court lacks jurisdiction over IDEM, a state agency. *See* R. 9 at 1. It alleged that the plaintiff debtor, by filing an adversary proceeding, sought to enjoin the State of Indiana from exercising its police and regulatory powers over a wetlands mitigation project

approved by IDEM. *See id.* It claimed that the Eleventh Amendment prohibited federal jurisdiction over civil actions brought against an unconsenting state agency. IDEM also pointed out that it had not waived its Eleventh Amendment immunity because it never filed an appearance or a claim in Leiter's bankruptcy case.

In his Response, the plaintiff argued that IDEM, after choosing not to file a claim or to participate in the bankruptcy, began pursuing its state administrative litigation two years after his bankruptcy discharge. He insisted that IDEM was not exempt from federal bankruptcy law and, in particular, from this court's order of discharge, which "operates as an injunction against the commencement or continuation of an action, . . . or an act, to collect" a discharged debt. R. 10 at 2 (quoting 11 U.S.C. § 524(a)(2)). In fact, he contended, sovereign immunity is abrogated for governmental units such as IDEM with respect to a § 524 bankruptcy discharge. The plaintiff also pointed out that his construction of a berm on the property gave the land "at least as much 'wetland' on the property as when Leiter bought it." *Id.* at 5-6. He filed the Complaint to enforce his discharge.

Discussion

IDEM has asked the court to dismiss the plaintiff's complaint for lack of jurisdiction. Federal Rule of Civil Procedure 12(b)(1), made applicable in bankruptcy adversary proceedings by Federal Rule of Bankruptcy Procedure 7012(b), provides for dismissal of an action for "lack of jurisdiction over the subject matter." Fed. R. Civ. P. 12(b)(1). The Seventh Circuit Court of Appeals has stated clearly that the party claiming jurisdiction bears the burden of proof under Rule 12(b)(1). S*ee United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942, 946 (7th Cir.) (en banc), *cert. denied*, 540 U.S. 1003 (2003).

> If subject matter jurisdiction is not evident on the face of the complaint, the motion to dismiss pursuant to Rule 12(b)(1) would be analyzed as any other motion to dismiss, by assuming for purposes of the motion that the allegations in the complaint are true. However, as here, if the complaint is formally sufficient but the contention is that there is *in fact* no subject matter jurisdiction, the movant may use affidavits and other material to support the motion. The burden of proof on a 12(b)(1) issue is on the party asserting jurisdiction. And the court is free to weigh the evidence to determine whether jurisdiction has been established. Factual findings rendered during this process are reviewed for clear error.

Id (citations omitted).

IDEM's dismissal motion is based upon its claim of sovereign immunity. It asserts that the Eleventh Amendment bars the plaintiff from bringing an adversary suit against it, an unconsenting state agency, in this court. The Eleventh Amendment to the United States Constitution states:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

U.S. Const. amend. XI. The Supreme Court has held that the Eleventh Amendment prohibits suits against an unconsenting state by its own citizens, as well. *See Edelman v. Jordan*, 415 U.S. 651, 662-63, 94 S. Ct. 1347, 39 L.Ed.2d 662 (1974); *Hans v. Louisiana*, 134 U.S. 1, 15, 10 S. Ct. 504, 33 L.Ed. 842 (1890). The Court also has extended the Eleventh Amendment's immunity from suit to any duly created agency of the state. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100-01, 104 S. Ct. 900, 79 L.Ed.2d 67 (1984). Indeed, it broadly held that "the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States" even when Article I of the Constitution gives Congress the authority to make laws allowing such suits. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73, 116 S. Ct. 1114, 1131-32 134 L.Ed.2d 252 (1996) ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.").

Relying on *Seminole Tribe* and its progeny, the Seventh Circuit Court of Appeals concluded that the Supreme Court's holding "extends to all of Congress' Article I powers, including the Bankruptcy Clause,[1] and thus properly concluded that Section 106(a)[2] was unconstitutional under the Eleventh Amendment." *Nelson v.*

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[1] The Bankruptcy Clause in Article I of the Constitution provides that Congress shall have the power to establish "uniform laws on the subject of bankruptcies throughout the United States." U.S. Const. Art. I, § 8, cl. 4.

[2] Congress implemented its authority under the Bankruptcy Clause by including in the Bankruptcy Code § 106(a), which provides, in relevant part:

> (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section ...

11 U.S.C. § 106(a).

La Crosse County Dist. Atty., 301 F.3d 820, 831 (7th Cir. 2002) (citing cases). The circuit court concluded that, because Congress lacked the authority to abrogate state sovereign immunity by enacting § 106(a), the state was entitled to Eleventh Amendment immunity from the debtor's adversary proceeding. *See id.* at 838.

Nelson is procedurally similar to the case before this court. In *Nelson*, the debtor had filed a chapter 7 bankruptcy case and had received her discharge. The State of Wisconsin did not file a claim in her bankruptcy case. Months after her discharge, however, the county district attorney's office filed a criminal action against her. When the debtor filed a post-discharge adversary proceeding in her bankruptcy case, alleging that the state agency had violated her § 524 discharge by initiating the action against her, the State defendants filed a motion to dismiss for lack of subject matter jurisdiction. The bankruptcy court denied the dismissal motion after determining that the Eleventh Amendment was not applicable in bankruptcy cases. However, the district court ruled that the Eleventh Amendment barred the debtor's private suit against the State defendants in bankruptcy court; it reversed the bankruptcy court's decision. *See id.* at 823-25. The Seventh Circuit affirmed, based on *Seminole Tribe* and the many court decisions following it. Had there been no further development of the law in this area, this court would have followed the precedential holdings in *Seminole Tribe* and *Nelson* and would have granted IDEM's motion to dismiss in this adversary proceeding.

However, this court now has new precedents to follow. In two recent cases the Supreme Court has addressed the applicability of an Eleventh Amendment immunity defense in bankruptcy proceedings. Two years ago, in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 124 S. Ct. 1905, 158 L.Ed.2d 764 (2004), the Court held that "a proceeding initiated by a debtor to determine the dischargeability of a student loan debt is not a suit against the State for purposes of the Eleventh Amendment." *Id.* at 443. Most recently, in *Central Virginia Community College v. Katz*, __ U.S. __, 126 S. Ct. 990, 163 L.Ed.2d 945 (2006), the Court ruled that a proceeding initiated by a bankruptcy trustee to set aside preferential transfers by the debtor to state agencies was not barred by sovereign immunity. *Katz*, like *Hood*, began from the bedrock principle that "[b]ankruptcy jurisdiction, at its core, is *in rem*." *Id.*, 126 S. Ct. at 995. Because the bankruptcy process focuses on the

adjudication of claims on a debtor's *res* or property, the Supreme Court found that "it does not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction." *Id.* The Court then reviewed in depth the history of the Bankruptcy Clause of the United States Constitution and determined that, "[i]n ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts." *Id.* at 1005. The Court concluded: "Congress may, at its option, either treat States in the same way as other creditors insofar as concerns 'Laws on the subject of Bankruptcies' or exempt them from operation of such laws. Its power to do so arises from the Bankruptcy Clause itself; the relevant 'abrogation' is the one effected in the plan of the Convention, not by statute." *Id.*; *see also Chattanooga State Technical Cmty. Coll. v. Johnson (In re North Am. Royalties, Inc.)*, 2006 WL 587597 (E.D. Tenn. March 10, 2006) (following *Katz*, affirming bankruptcy court's denial of state college's motion to dismiss trustee's turnover complaint).

After the *Katz* ruling, the Eighth Circuit commented that bankruptcy cases comprise "an exception to the general rule that Congress must expressly abrogate states' sovereign immunity." *St. Charles County v. Wisconsin*, 447 F.3d 1055, 1058 n.4 (8th Cir. 2006). It considered the exception a narrow one based on "'the Bankruptcy Clause's unique history, combined with the singular nature of bankruptcy courts' jurisdiction.'" *Id.* (quoting *Katz*, 126 S. Ct. at 1000 n.9). However, in the view of commentators who read the decision broadly, "*Katz* suggests that the sovereign-immunity defense may be significantly curtailed in bankruptcy proceedings." David B Stratton, *Once More Into the Breach*, 25-APR Am. Bankr. Inst. J. 32, 32 (Apr. 2006).

Of particular relevance to this case is the discussion in *Hood* concerning the types of judicial actions by which states may still be bound without their consent. The Court focused first on the fact that a bankruptcy court's discharge of debt is an *in rem* proceeding. *See Hood,* 541 U.S. at 447, 124 S. Ct. at 1910. Its "*in rem* jurisdiction permits it to 'determine all claims that anyone, whether named in the action or not, has to the property or thing in question.'" *Id.* at 448, 124 S. Ct. at 1911 (citation omitted). Reviewing a typical chapter 7 proceeding,

the Court noted that the debtor's creditors are notified of the bankruptcy court's order for relief and of the opportunity to file a proof of claim in order to participate in the debtor's assets. It then stated:

> If a creditor chooses not to submit a proof of claim, once the debts are discharged, the creditor will be unable to collect on his unsecured loans. The discharge order releases a debtor from personal liability with respect to any discharged debt by voiding any past or future judgments on the debt and by operating as an injunction to prohibit creditors from attempting to collect or to recover the debt.
>
> . . .
>
> Under our longstanding precedent, States, whether or not they choose to participate in the proceeding, are bound by the bankruptcy court's discharge order no less than other creditors.

Id. at 447-48; 124 S. Ct. at 1910-11.[3] The Court made clear that "the Bankruptcy Court's *in rem* jurisdiction allows it to adjudicate the debtor's discharge claim without *in personam* jurisdiction over the State." *Id.* at 453, 124 S. Ct. at 1914. It then concluded: "Clearly dismissal of the complaint is not appropriate as the court has *in rem* jurisdiction over the matter, and the court here has not attempted to adjudicate any claims outside of that jurisdiction." *Id.* at 454, 124 S. Ct. at 1914.

The holding in *Katz* notifies States that the Bankruptcy Clause subordinated the states' sovereignty rights in bankruptcy and that the states agreed to that result by ratifying the Constitution. The holding in *Hood* tells States that they are bound by a bankruptcy court's discharge order just as other creditors are. *Hood* also makes clear that a bankruptcy court can exercise its *in rem* jurisdiction to adjudicate this adversary proceeding without offending the State's sovereignty. In light of these clear precedents, this court finds that IDEM, as a state agency, does not enjoy sovereign immunity from suit in this case. It determines, therefore, that IDEM's motion to dismiss must be denied.

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[3] The Court was careful not to aggrandize its ruling. It neither held that "a bankruptcy court's *in rem* jurisdiction overrides sovereign immunity" nor that "every exercise of a bankruptcy court's *in rem* jurisdiction will not offend the sovereignty of the State." Rather, it concluded "that the court's exercise of its *in rem* jurisdiction to discharge a student loan debt is not an affront to the sovereignty of the State." *Id.* at 451 n. 5, 124 S. Ct. at 1913 n. 5.

CONCLUSION

For the reasons presented above, the Motion to Dismiss for Lack of Jurisdiction filed by the defendant Indiana Department of Environmental Management is hereby denied.

SO ORDERED.

/s/ Harry C. Dees, Jr.
HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT